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No. 91-325

Supreme Court, U.S.

FILED

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In The
Supreme Court of the United States
October Term, 1991

THE SUPERIOR COURT, COUNTY OF SAN DIEGO,

Petitioner,

v.

THE COPLEY PRESS, INC.,

Respondent.

Petition For Writ Of Certiorari To The
Court Of Appeal For The State Of California
Fourth Appellate District, Division One

OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the California Court of Appeal err when it applied the principles of *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984) to written questionnaires during the *voir dire* process?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were:

Petitioner/Appellant:

The Superior Court of the State of California, in
and for the County of San Diego.

Respondent/Appellee:

The Copley Press, Inc.

Subsidiaries to the Copley Press, Inc. are:

Copley Northwest, Inc.
Puller Paper Company
Copley Press Electronics Company
Rio Zorro Publications, Inc.
Sun Publications, Inc.

Real Parties in Interest:

The People of the State of California, represented
by the Office of the District Attorney of the County of San
Diego

Roberta D. Pearce.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS BELOW.....	ii
OPINION BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS INVOLVED.....	2
INTRODUCTION.....	2
STATEMENT OF THE CASE.....	4
REASONS FOR DENYING THE PETITION.....	4
A. Petitioner's Reasons in Support of Granting The Petition Were Previously Addressed by This Court In <i>Press-Enterprise v. Superior Court</i> and Do Not Provide a New Basis for Granting the Petition	4
B. The Court of Appeal Correctly Applied <i>Press- Enterprise</i> ; Therefore, There Is No Basis for Review.....	6
C. Petitioner Improperly Seeks an Advisory Opin- ion.....	8
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASE

<i>Press-Enterprise v. Superior Court</i> , 464 U.S. 501 (1984)	<i>passim</i>
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OPINION BELOW

The California Court of Appeal decision is attached
to the Petition as the Appendix.

JURISDICTION

Respondent does not disagree with petitioner's state-
ment of jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent has no constitutional provisions to add to those cited by Petitioner.

INTRODUCTION

Respondent, The Copley Press, Inc., opposes the petition for Writ of Certiorari on the following grounds: (1) The rationales petitioner advances in support of review were addressed and rejected in *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984); (2) The Court of Appeal correctly applied the principles enunciated in *Press-Enterprise*; and (3) Petitioner improperly seeks an advisory ruling from this court as to the propriety of an hypothetical *voir dire* questionnaire that has not yet been used by the trial court.

Petitioner now raises questions substantially different from the questions it raised below. At issue in this case is the validity of trial court procedures that impermissibly provide blanket confidentiality to written questionnaires used as part of the *voir dire* in criminal proceedings. The question posed by respondent in the Writ proceedings before the California Court of Appeal framed that issue this way: "May the public be denied access to *voir dire* proceedings in a criminal case merely because *voir dire* is conducted primarily in written form rather than orally?"

In its response in the Writ proceedings in the California Court of Appeal, petitioner countered that the questionnaires were not part of *voir dire*, but rather were a

form of pretrial discovery by the trial court and the parties that was exempt from this Court's rulings on openness in criminal proceedings.¹ Having failed in that contention, petitioner now attempts in its statement of questions for review to recast the issue as one of juror rights:

1. Must jurors disclose confidential information about themselves or others without a prior assurance of confidentiality; and
2. Is an in-camera proceeding the only way confidential information can be communicated by a juror to a judge and attorneys?

(Petition ("Pet.") at i.)

In fact, nothing in the court of appeal decision blocks California trial courts from protecting confidential information about prospective jurors or forecloses jurors from seeking such protection before answering sensitive personal questions. The court of appeal expressly recognized that trial courts should safeguard jurors' rights of privacy and set forth a practical framework for accommodating jurors' privacy rights, the rights of the public to information about criminal trials, and the interests of judicial economy. That framework embodies the Court's mandate that "The privacy interests of (jurors) . . . be balanced

¹ The Petition then stated the questions as follows:

1. Does the press have a right of access to confidential pretrial discovery documents?
2. If such a right exists, is that right paramount to a criminal defendant's Sixth Amendment right to an impartial jury trial and the individual juror's right of privacy?

against the historic value we have discussed and the need for openness of the process." (*Press Enterprise*, 464 U.S. at 512.)

Notwithstanding petitioner's creative restatement of the issues, the court of appeal correctly formulated and decided the constitutional issue presented in the Writ Petition before it. This Court should not devote its resources to reviewing that decision.

STATEMENT OF THE CASE

The court of appeal decision and the Introduction, above, constitute Respondent's Statement of the Case.

REASONS FOR DENYING THE PETITION

A. **Petitioner's Arguments in Support of Granting The Petition Were Fully Addressed by This Court In *Press-Enterprise v. Superior Court* and Do Not Provide a New Basis for Granting the Petition.**

Petitioner seeks Supreme Court approval for giving prospective jurors an absolute assurance of confidentiality before answering *voir dire* questions. (Pet. at 16-17.) Petitioner's arguments that absolute confidentiality is necessary to protect the juror's right to privacy and preserve a criminal defendant's right to a fair and impartial jury trial (Pet. at 11) were thoroughly addressed and rejected by this Court in *Press-Enterprise v. Superior Court*, 464 U.S. 501.

In *Press-Enterprise*, the trial court asserted these same interests in arguing extended periods of *voir dire* should be closed to the public. (*Id.* at 510.) A unanimous Court held the constitutional guarantees of open public proceedings in criminal trials covered proceedings for the *voir dire* of potential jurors. The Court reasoned that the "presumption of openness may be overcome only by an overriding interest based on specific findings that closure is essential to preserve higher values and that closure is narrowly tailored to serve that interest." (*Id.* at 510.)

Press-Enterprise plainly prohibits blanket confidentiality during *voir dire*. The mere assertion of a juror's right to privacy and defendant's right to a fair trial are not enough to overcome the presumption of openness. This Court observed that "the California court's conclusion that Sixth Amendment and privacy interests were sufficient to warrant prolonged closure was unsupported by findings showing that an open proceeding in fact threatened those interests. . . ." (*Id.* at 510-511.) Even if these interests were adequate to support closure, the Court cautioned the trial court must consider "whether alternatives were available to protect the interests of the prospective jurors that the trial court's orders sought to guard." (*Id.* at 511.)

Petitioner proposes giving jurors unfettered control over which answers will be confidential, thereby eliminating the balancing process. Petitioner also proposes a new test for determining whether an *in camera* transcript will be released:

[I]n balancing the juror's right of privacy and the party litigants' right to a fair and impartial jury against the public's right to know, it seems

reasonable under these limited circumstances to balance the competing interests in favor of the jurors' right of privacy so the right to a fair and impartial jury can be preserved.

(Pet. at 17.)

This unprecedented standard for determining closure violates a tradition of choosing jurors in public that began in the sixteenth century. (*Press-Enterprise*, 464 U.S. at 505-508.) Petitioner's balancing test circumvents *Press-Enterprise*'s requirements that a trial court make findings "that closure is essential to preserve higher values and is narrowly tailored to serve that interest." (*Id.* at 510.) While advocating a presumption of closure, petitioner necessarily ignores this Court's requirement that record findings demonstrate that disclosure threatens a juror's privacy interest and that no other means exist to protect that interest.

In *Press-Enterprise*, this Court thoroughly and recently addressed how a juror's privacy interests and the defendant's right to a fair trial affect the presumption of openness in *voir dire* proceedings. There is no reason for the Court to re-visit the issue.

B. The Court of Appeal Correctly Applied *Press-Enterprise*; Therefore, There Is No Basis for Review.

Contrary to petitioner's contention that the court of appeal expanded the holding of *Press-Enterprise* (Pet. at 13), the court of appeal merely applied *Press-Enterprise* to the facts before it. The only difference between this case and *Press-Enterprise* is the form of *voir dire*; written versus

oral. However, *Press-Enterprise* provides no support for treating written *voir dire* differently from oral *voir dire*.

In refusing to keep access to written *voir dire* closed from the public and the press, the court of appeal applied the guidelines set forth in *Press-Enterprise*:

Henceforth, the superior court shall inform the venirepersons of their right to request in camera hearings to answer specific sensitive questions rather than filling out those answers on the questionnaire form. No explicit or implicit promise of confidentiality should be attached to the information contained in the questionnaires; rather the venirepersons shall be expressly informed the questionnaires are public records. Second, the superior court shall provide access to the questionnaires of individual jurors when the individual juror is called to the jury box for oral *voir dire*.

(Appendix to Petition ("App.") at 14.)

In determining how to protect legitimate privacy rights, the court of appeal specifically followed the procedures set forth in *Press-Enterprise*:

[T]he proper approach is to have the superior court advise the venirepersons that they have the right to request in camera hearings on sensitive questions rather than writing their answers in the questionnaire. Counsel should be present and the session should be reported, with the trial court determining afterward on the record whether a legitimate public interest warrants protection.

(App. at 13-14.)

The court of appeal's ruling is a straightforward application of *Press-Enterprise* to written *voir dire* proceedings. Since this ruling does not deviate from established Supreme Court precedent, review should be denied.

C. Petitioner Improperly Seeks an Advisory Opinion.

In this case, petitioner used a questionnaire with 219 questions. (App. at 14.) The questionnaire contained the following advisement:

[T]he information contained in this questionnaire will become part of the court's permanent record. However, it will not be distributed to anyone except [the trial court], [the court's] staff and the attorneys in the case while it is pending.

(App. at 5.)

Petitioner now asks the Court to rule on the constitutionality of a newly envisioned and hypothetical *voir dire* questionnaire. Petitioner proposes that to "facilitate a juror's ability to choose confidentiality for each question, the questionnaire would have a box placed next to each question, if checked by a juror, would indicate his or her request for the written response to be given only the judge and attorneys." (Pet. at 12-13.) Petitioner proposes that by checking this box, a juror will be given a prior assurance of confidentiality that an answer will never be made public. (Pet. at 17.) Petitioner seeks this Court's advice on the constitutionality of such a *voir dire* form before it is used by a trial court or reviewed by a California appellate court. The constitutionality of this hypothetical questionnaire was not before the court of appeal

and is not ripe for review. Accordingly, this Court should decline to grant Certiorari to review its constitutionality.

CONCLUSION

The court of appeal's decision correctly applied the principles of *Press-Enterprise* to a written *voir dire* questionnaire. Having clearly enunciated the constitutional principles involved in denying the public and press access to *voir dire*, this Court should not grant Certiorari in this case to restate those principles. This Court should deny the Petition for Writ of Certiorari.

DATED: September 23, 1991

Respectfully submitted,

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